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No. 75-19

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent Santana argues that the entry into her vestibule to arrest her was unlawful because the officers failed to announce their purpose and demand admittance before entering. We briefly recapitulate the facts pertinent to that contention.

Moments before police approached her house, Santana had sold a "bundle" of heroin to Patricia McCafferty, who in turn sold it to an undercover officer. McCafferty was arrested immediately after the second sale. She told police that Santana had the purchase money (App. 7-8, 29-30, 42). The officer who arrested McCafferty gave a signal (indicating a successful purchase) to surveillance officers. Those officers drove the short distance to Santana's house and got out of the van with their guns drawn. The officers testified that one officer displayed his badge and identification card and shouted "police" as he approached the house (App.

30-31, 34, 35, 38, 53). Santana, who was standing in the open doorway holding a brown paper bag in her hand, turned and retreated into the vestibule (App. 31, 35, 38, 41, 53). The officers followed her through the door, which she left open, and arrested her in the vestibule.

a. In *Miller* v. *United States,* 357 U.S. 301, the Court endorsed the commonlaw rule that requires law enforcement officers to announce their identity and purpose before they "break the door of a house to effect an arrest" (*id.* at 306-307; footnote omitted). The Court repeatedly emphasized that it is the forcible entry—the breaking—that the rule is designed to prevent. *Id.* at 306-311, 313-314. The record here discloses, without contradiction, that the officers did not force their way into the house. They went in through an open door. In fact, they encountered no obstacle in entering, either from an external barrier or from the people inside the house. Nor did they surprise an occupant within or, for example, rudely awaken someone slumbering in an upstairs bedroom. Respondent Santana was fully aware that the officers were approaching. Because the entry in this case involved neither surprise nor force,[1] the common law rule requiring an announcement is simply not applicable.

Santana argues (Br. 15) that an announcement must precede any entry, whether or not forcible, citing *Sabbath* v. *United States,* 391 U.S. 585. But *Sabbath* involved an unannounced opening of an unlocked door. That entry involved both surprise to those within the

[1]There is nothing to Santana's claim (Br. 15) that the officers' approach with guns drawn constituted "an assault on the house." There is no indication in the record that the guns were drawn as part of an effort to invade the house; only Santana's retreat caused the entry into the vestibule.

dwelling and the application of some sort of physical exertion by the officers—beyond just walking in—to gain entry. As the Court emphasized (391 U.S. at 590):

> An unannounced intrusion into a dwelling * * * is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door.

Conspicuously absent from the list is the central feature of this case: entry through an open door.[2] The courts of appeals that have considered the question have held that entry through an open door requires no announcement. See, *e.g., United States* v. *Morell,* 524 F.2d 550, 556 (C.A. 2); *United States* v. *Lopez,* 475 F.2d 537, 540-541 (C.A. 7); *United States* v. *Johns,* 466 F.2d 1364 (C.A. 5); *United States* v. *Conti,* 361 F.2d 153 (C.A. 2), vacated on other grounds, 390 U.S. 204; *United States* v. *Williams,* 351 F.2d 475 (C.A. 6); *United States* v. *Hassell,* 336 F.2d 684 (C.A. 6), certiorari denied, 380 U.S. 965.[3] Cf. *United States* v. *Bradley,* 455 F.2d 1181,

[2]In a footnote to the passage quoted above, the *Sabbath* Court observed that "[w]e do not deal here with entries obtained by ruse, which have been viewed as involving no 'breaking.' " Ruse entries, like the entry here, characteristically involve armed officers walking in through doors that are open.

[3]The District of Columbia Circuit, alone among federal courts, has held that officers must announce their authority and purpose before entering through an open door. *Hair* v. *United States,* 289 F.2d 894. This case has been explicitly rejected by other courts of appeals. See, *e.g., Ng Pui Yu* v. *United States,* 352 F.2d 626 (C.A. 9). It also appears to be inconsistent with the language of 18 U.S.C. 3109 and unsupported by the rationales for such a rule. See generally Note, *Announcement in Police Entries,* 80 Yale L. J. 139 (1970), and Blakey, *The Rule of*

1185-1186 (C.A. 1), affirmed, 410 U.S. 605. Other cases are collected in Annotation, 21 A.L.R. Fed. 820, 881-884 (1974). These cases are consistent with the language of 18 U.S.C. 3109, upon which the federal announcement requirement is based. That statute provides that an "officer may break open any outer or inner door or window of a house" in order to make an authorized search or arrest. *Sabbath* held that the unannounced opening of a closed door is a "breaking" of that door. But there can be no "breaking," or anything resembling a "breaking," when officers simply enter through a completely open door and arrest in the vestibule a person who observed the officers' approach.[4]

b. It has always been the rule that if a person who has been arrested escapes and is chased in hot pursuit, the pursuing officers need not pause even at the closed door of a building to announce their authority and purpose. See *Ker* v. *California,* 374 U.S. 23, 54-55 (opinion of Brennan, J.). The eight Justices who expressed a view on the matter in *Ker* agreed that when the exigencies of a situation call for prompt action, or when

Announcement and Unlawful Entry: Miller v. *United States and Ker* v. *California,* 112 U. Pa. L. Rev. 499 (1964), which discuss the common law rule of announcement. The rule was thought necessary to protect inhabitants of a house from useless violence that could be avoided by a voluntary opening of doors. See *Lee* v. *Gansell,* [1774] Lofft's 374, 381. Cf. 2 Hale, *Pleas of the Crown* 90 n. 8 (1847). An entry through an open door is not the sort of violent, obnoxious and dangerous act with which the courts were concerned. See *Jones* v. *United States,* 336 A.2d 535, 538 (D.C. Ct. App.), certiorari denied, December 1, 1975 (No. 75-5383) (no announcement needed for officers to push open door partially opened by occupants); *United States* v. *Syler,* 430 F.2d 68, 70 (C.A. 7) (same). To the extent the announcement rule is rooted in concern for an individual's right of privacy in his own house, it serves only to delay entry for a few moments. It never prevents entry. An occupant who sees officers approaching an open door has no legitimate interest in securing such a momentary respite from entry. See also pages 17-19 of our main brief.

[4]Pennsylvania has a rule similar to 18 U.S.C. 3109. Pa. R. Crim. P. 2007(a) provides that an officer executing a search warrant shall,

an announcement would be superfluous, none need be made.[5] That rule should apply with equal force to an arrest made in fresh pursuit without the element of escape from custody. The same justifications that, we have argued (Br. 21-30), support a prompt and warrantless entry to make an arrest also should be sufficient to support an entry through an open door in pursuit of a retreating person, without formal announcement of purpose and demand to enter. See *Vanella* v. *United States,* 371 F.2d 50, 58 (C.A. 9), certiorari denied, 386 U.S. 920 (no announcement is required to enter through an open door in fresh pursuit); *United States* v. *Bustamante-Gamez,* 488 F.2d 4 (C.A. 9), certiorari denied, 416 U.S. 970 (no announcement is required to enter through a closed door in hot pursuit); *United States* v. *Mapp,* 476 F.2d 67 (C.A. 2) (any announcement in a fresh pursuit situation can dispense with a statement of purpose and demand to enter). Cf. *Miller* v. *United States, supra,* 357 U.S. at 310.

"before entry, give, or make a reasonable effort to give, notice of his identity, authority and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require his immediate forcible entry." Pennsylvania courts have followed federal precedents interpreting Section 3109 in construing the state rule. See, *e.g., Commonwealth* v. *Clemson,* 234 Pa. Super. 740, 338 A.2d 649. In particular, they have interpreted this rule and earlier state rules as requiring a suitable announcement prior to a "forcible" entry. See, *e.g., Commonwealth* v. *DeMichel,* 442 Pa. 553, 561; *Commonwealth* v. *Easton,* 231 Pa. Super. 398, 332 A.2d 448; *Commonwealth* v. *Mazzella,* 231 Pa. Super. 247, 331 A.2d 784. Our research has not disclosed any Pennsylvania case dealing with entry through an open door. We do not believe, however, that Pennsylvania courts would interpret Pa. R. Crim. P. 2007(a) to require an announcement not required by 18 U.S.C. 3109.

[5]See also *Wong Sun* v. *United States,* 371 U.S. 471, 483-484; *Miller* v. *United States, supra,* 357 U.S. at 309; *Read* v. *Case,* 4 Conn. 166; ALI, *A Model Code of Pre-Arraignment Procedure* 310-313 (1975) (Reporters' notes to §120.6, which allows warrantless arrest entries).

c. Assuming that some sort of announcement is required in a case like this one, we believe that the display of identity cards and the shout of "police" is sufficient to alert a person who can see the onrushing officers that entry is demanded. A more formal demand to enter would be superfluous and, in light of the possibility of flight, destruction of evidence, and the like if the officers had paused at the threshold to await permission to enter, should not be required.[6]

Although, as we have indicated, the arresting officers testified that they displayed their identity cards and shouted "police," Santana's daughter and daughter-in-law testified that the officers did not identify themselves (App. 56-63). The district court did not resolve this conflict in the testimony, and neither the district court nor the court of appeals has considered whether, if an announcement was required, an adequate announcement was made. If this Court should hold, contrary to our arguments, that some announcement was necessary, it would be appropriate to return this case to the district court so that it can make the pertinent findings of fact.

2. In *Scher* v. *United States,* 305 U.S. 251, a case not discussed in our opening brief, this Court held that officers acted reasonably in making a warrantless entry into, and warrantless arrest in, a garage. We submit that *Scher* supports the arguments we have made in this case. In that case, officers had probable cause to believe that Scher was transporting illegal distilled spirits in his car. They followed Scher's car as it made stops at several places and as it returned to his own residence. Scher "turned into a garage a few feet back of his

[6]Several courts of appeals have approved brief announcements similar in content to the one the officers testified they gave in this case. See, *e.g., United States* v. *Wysong,* 528 F.2d 345, 347 (C.A. 9) ("Federal Agents, open up"); *United States* v. *Squella-Avendano,* 447 F.2d 575, 577 (C.A. 5) ("Police. Open the door"). Cf. *United States* v. *Manning,* 448 F.2d 992, 1001 (C.A. 2) (*en banc*), certiorari denied, 404 U.S. 995. If notice of this sort is sufficient when the door is closed, a simple shout of "police" and a display of identification should be sufficient when the door is open and the occupant is in a position to see the identification.

residence and within the curtilage. One of the pursuing officers left their car and followed. As [Scher] was getting out of his car this officer approached, announced his official character, and stated he was informed that the car was hauling bootleg liquor" (305 U.S. at 253). The officer searched the car, discovered illegal liquor, and arrested Scher. He had neither a search warrant nor an arrest warrant. *Id.* at 253-254.

Scher argued that both the entry into the garage through its open door and his subsequent warrantless arrest were unconstitutional. This Court unanimously disagreed, writing (305 U.S. at 255): "[I]t seems plain enough that just before [Scher] entered the garage the following officers properly could have stopped [Scher's] car, made search and put him under arrest. So much was not seriously controverted at the argument. Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. * * * The officers did nothing either unreasonable or oppressive." Similarly, because the police could have arrested respondent Santana as she stood in her doorway (*United States* v. *Watson,* No. 74-538, decided January 26, 1976), her retreat into her vestibule (with the officers close behind) did not destroy their right to arrest her.

3. We have argued (Br. 23-29) that even if the Court does not accept our contention that a chase into the vestibule supports the arrest of Santana, it should interpret the hot pursuit exception to the warrant requirement to allow an entry during the commission of a crime and within a few hours thereafter. The District of Columbia Circuit recently, in the context of a warrantless search of a parked and unoccupied automobile, has accepted our argument that the hot pursuit rationale comprehends official action within a few hours of the

crime, and that a chase is unnecessary. See *United States* v. *Robinson*, C.A. D.C., No. 74-1778, decided October 16, 1975 (*en banc*), opinion filed February 24, 1976, slip op. 11-13, certiorari denied, March 8, 1976, No. 75-5908.

4. The officers knew that Santana had sold heroin to McCafferty only moments before they approached Santana's house. They also had strong reason to believe that Santana still possessed heroin available for distribution. Under those circumstances prompt arrest was not only justified but imperative. Although we believe that the fresh pursuit doctrine is the proper ground upon which to sustain Santana's arrest, it also could be sustained upon an argument that "exigent circumstances" exist whenever a crime is ongoing. As Mr. Justice Marshall recently has observed (*United States* v. *Watson*, *supra*, dissenting slip op. 2): "When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause the escape of the suspect or the destruction of the evidence." Because the officers reasonably believed that Santana was committing the crime of possession of heroin, and also believed that she possessed evidence (the proceeds) relating to her sale of heroin to McCafferty, they were entitled to arrest her as promptly

as possible, even though this required them to enter the vestibule of her house.[7]

For the foregoing reasons, in addition to the reasons discussed in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

ROBERT H. BORK,
Solicitor General.

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[7]Our brief collected (p. 42, n. 23) several cases that have followed *Dorman* v. *United States*, 435 F.2d 385 (C.A. D.C.) (*en banc*), in erecting a presumption that a warrant is necessary to enter a private place to make an arrest. We listed the Ninth Circuit as an adherent to the *Dorman* approach. More recently, however, another panel of the Ninth Circuit has stated that the question remains open there. *United States* v. *McLaughlin*, 525 F.2d 517, 520. On the other hand, a divided Supreme Court of California has joined the three other state courts that now embrace the *Dorman* rule. *People* v. *Ramey*, 127 Cal. Rptr. 629, 545 P.2d 1333. But cf. *Sheff* v. *State*, Sup. Ct. Fla., decided February 25, 1976, 18 Crim. L. Rep. 2551 (warrantless probable cause arrest is upheld and evidence seized from defendant's person is admissible, even on the assumption that the entry into his apartment was unconstitutional).